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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED *

1. Whether EPA is collaterally estopped from relitigating in this case from the Sixth Circuit the identical question of statutory interpretation which the Tenth Circuit had already resolved against EPA in earlier litigation involving the same parties and virtually identical facts.

2. Whether EPA has power under Section 114(a)(2) of the Clean Air Act to designate a private contractor as its "authorized representative" for purposes of obtaining and executing administrative search warrants.

* These questions have been restated from those set out in petitioner's brief.

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BRIEF FOR RESPONDENT[1]

INTRODUCTION

This case concerns the Environmental Protection Agency's ("EPA's") attempted use of private contractors to carry out inspections of plants under Section 114(a)(2) of the Clean Air Act ("the Act"), 42 U.S.C. § 7414(a)(2).[2] The facts and circumstances of this case are virtually identical to those of a contemporaneous, parallel case in-

[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, respondent's non-wholly owned subsidiaries and affiliates were set out in a list at Appendix A to Respondent's Memorandum In Opposition to the petition.

[2] EPA suggests that the contractors were only to provide "technical assistance" to EPA employees in conducting the inspection. See Brief for United States ("EPA's Brief") at 2. However, the warrants authorized the contractors themselves to enter and conduct the inspection (see Warrant, Joint Appendix in Court of Appeals ("Jt. App. Ct. Appls.") 49), and EPA's overview inspection program contemplates that contractors will inspect plants both with and without the presence of an EPA employee. See *infra* at 3. Most importantly, EPA's preferred interpretation of the relevant statutory provisions would allow contractors both to obtain and to execute warrants independently of EPA officials. See *infra* at 22-23.

volving the same parties. The precise issue of statutory interpretation arising here was resolved against EPA in this prior case.

In March and April of 1980, EPA sought to use contractors as its "authorized representatives" to enter two plants owned and operated by Stauffer Chemical Co. ("Stauffer"). Each of the inspections by contractors was to take place as part of the Agency's "overview inspection program," instituted for the purpose of auditing state enforcement and inspection procedures. See EPA's Brief at 2 n.1. In each instance, EPA officials and the contractors first arrived without a warrant and sought to enter and inspect the plants. Company officials then noted that they had no objection to an inspection by EPA or state officials, but that they wanted an agreement to protect trade secrets before private parties examined plant premises. Although in both cases subsequent discussions took place regarding such an agreement, EPA sought and obtained from federal magistrates on an *ex parte* basis administrative search warrants specifically authorizing the contractors to enter the plants and inspect the premises. Stauffer refused to honor the warrants insofar as the contractors were concerned and sought from the pertinent federal district courts orders quashing the warrants and enjoining the inspections. In both cases, by order or agreement, the warrants were stayed pending a judicial ruling on the merits.

In the first decision (*"Stauffer I"*),[3] the U.S. District Court for the District of Wyoming quashed the warrant and enjoined further inspections using contractors, ruling that EPA had no authority under the Act to designate contractors as its "representatives" for purposes of entry and inspection. The Tenth Circuit affirmed.

In the second and instant case (*"Stauffer II"*), the U.S. District Court for the Middle District of Tennessee

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[3] *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), *aff'd sub nom. Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981).

upheld EPA's asserted authority to designate private contractors as inspectors under the Clean Air Act. (511 F. Supp. 744, Pet. App. 44a-56a.) The Sixth Circuit, however, reversed, holding (1) that EPA was collaterally estopped by the decision in *Stauffer I* from designating private contractors to conduct the inspection, and (2) that the Act substantively does not authorize the Agency to designate contractors to carry out that task. (684 F.2d 1174, Pet. App. 1a-41a.)

Because of the direct relevance of the decision in *Stauffer I* to this case (*Stauffer II*), the statement of the case which follows will address both actions, beginning with the district court proceeding in *Stauffer I*.

STATEMENT OF THE CASE

EPA's inspections of Stauffer's plants using the Agency's own designated employees have always proceeded without incident and with Stauffer's full cooperation. On the few occasions prior to 1980 when EPA requested that its private contractors visit a plant, Stauffer and EPA negotiated an agreement signed by the contractor and Stauffer to protect trade secrets. The visits by contractors then took place in due course. (Jt. App. Ct. Appls. 100, 103, 108, 111-112.)

A. District Court Proceedings in *Stauffer I*

Region VIII of EPA is headquartered in Denver and has responsibility for a six-state area encompassing Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming. Beginning with calendar year 1980, EPA's Region VIII began using private contractors in carrying out its overview inspection program. *Stauffer I*, 14 Env't Rep. Cas. (BNA) at 1739 (¶¶ 14-15). Inspections were to be handled primarily by the private contractors, both with and without the presence and supervision of a full-time EPA employee. *Id.* (¶ 15).

The contractor employed by EPA in *Stauffer I* was GCA Corporation ("GCA"). The GCA engineers were to inspect Stauffer's phosphate ore processing plant located at Leefe (near Sage), Wyoming. *Id.* (¶ 11).

The inspection at the Leefe plant was first attempted on April 10, 1980. An EPA employee, a Wyoming employee, and the two GCA employees arrived unannounced at the plant. *Id.* at 1738 (¶ 5). Stauffer's employees told the group that they had no objections to an inspection by EPA and Wyoming officials, but that a written agreement to protect trade secrets would have to be executed by GCA and Stauffer before the contractor's employees would be allowed entry. *Id.* (¶¶ 6-8). The EPA and Wyoming employees chose not to make the inspection. Thereafter, discussions regarding a trade-secrets agreement proceeded between EPA and Stauffer based on the text of an agreement which had been used earlier when an EPA contractor had visited a different Stauffer plant. *Id.* (¶ 9).[4]

While the discussions were still underway, on May 8, 1980, EPA sought an administrative search warrant from the U.S. Magistrate in Cheyenne, Wyoming. The warrant was issued on an *ex parte* basis that same day. *Id.* at 1738-39 (¶ 10). It authorized entry by "any duly designated enforcement officers of the Environmental Protection Agency, and authorized employees of EPA's contractor, GCA Corporation," and empowered these persons to inspect "facilities, processes, records, files and papers associated with the processing of phosphate ore." *Id.*

On May 13, 1980, a group consisting of an EPA employee, an EPA lawyer, a Wyoming employee, and the two GCA employees appeared unannounced at the plant and sought to execute the warrant. *Id.* at 1739 (¶ 11).

Stauffer's plant manager told the EPA and Wyoming officials that they were welcome to conduct the inspection

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[4] Stauffer *never* sought to restrict in any way an inspection by EPA's own employees. 14 Env't Rep. Cas. (BNA) at 1738-40 (¶¶ 6, 9, 11, 17-18). The contrary statement in EPA's brief is in error. EPA's Brief at 3.

Correlatively, Stauffer did not propose to limit the contractor's access to parts of the plant that emitted pollutants. It did want to control the contractor's access to other areas of the plant. 14 Env't Rep. Cas. (BNA) at 1739 (¶ 9).

but refused entry to the GCA employees absent an agreement to protect trade secrets. *Id.* The EPA officials decided not to conduct the inspection themselves, and the EPA and GCA group departed. Stauffer immediately moved in federal district court to quash the warrant and also sought a temporary restraining order enjoining execution of the warrant. The court granted such an order on the same day, May 13, 1980. *Id.* (¶ 12).

Thereafter, a two-day evidentiary hearing was held in the district court, and on June 23, 1980, the court entered judgment quashing the warrant and enjoining EPA from causing its private contractors to enter Stauffer's plants in Wyoming to conduct inspections. The court's ruling was premised on alternative grounds: *first*, that EPA had no authority under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), to designate private contractors as its "authorized representatives" for purposes of entry and inspection; and *second*, that in the particular circumstances EPA's use of an *ex parte* procedure to obtain the administrative search warrant from the federal magistrate violated principles of fundamental fairness. 14 Env't Rep. Cas. (BNA) at 1740-41.[5] On August 19, 1980, EPA filed notice of its appeal to the Tenth Circuit.

B. District Court Proceedings in *Stauffer II*

The contractor employed by EPA in *Stauffer II* was PEDCo Environmental, Inc. ("PEDCo"). Two PEDCo employees were to inspect Stauffer's elemental phosphorous plant located at Mt. Pleasant, Tennessee. (Jt. App. Ct. Appls. 38.) An EPA official, a Tennessee official, and

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[5] In connection with the second ground of its decision, the district court observed that

> EPA had Dr. O'Boyle and Mr. Gribb, both of whom were competent to have performed the inspection and both of whom were not denied entry, present, ready, and able to make the two or three hour inspection, but instead of letting them do it while the contract inspectors waited outside the plant, *EPA's counsel apparently wanted to make this a test case.*
>
> *Id.* at 1741 (¶ 3) (emphasis added).

these two PEDCo employees appeared unannounced at the plant on March 27, 1980. Stauffer's plant manager welcomed the inspection by EPA and Tennessee officials [6] but refused to allow the PEDCo employees to enter in the absence of a written agreement with PEDCo to protect trade secrets. (Jt. App. Ct. Appls. 59.) The EPA group left without making the inspection, and again discussions followed regarding a secrecy agreement. (*Id.*)

On August 7, 1980, approximately six weeks after the Wyoming federal district court in *Stauffer I* had ruled that EPA had no authority to employ private contractors to make inspections, EPA sought from a federal magistrate in Nashville, Tennessee, an administrative search warrant for PEDCo's employees to enter and inspect Stauffer's Mt. Pleasant plant. (Jt. App. Ct. Appls. 5-48.)[7]

The warrant was issued on an *ex parte* basis the same day. It authorized entry at and inspection of the Mt. Pleasant plant by "duly authorized full-time employees [of EPA], and accompanying, authorized representatives under contract to EPA." (Jt. App. Ct. Appls. 49.) On that same day, an EPA official, an EPA attorney, and the two PEDCo employees arrived at the plant to make the inspection. A Tennessee official accompanied them. Again, Stauffer's plant staff welcomed inspection by the EPA and Tennessee officials but refused to allow entry by PEDCo's employees absent a written agreement with PEDCo to protect trade secrets. (Jt. App. Ct. Appls. 64, 120.) No inspection was made. On the following day,

[6] Five months earlier, on October 17, 1979, EPA officials had conducted an oversight inspection at the plant. A Tennessee official was also present. (Jt. App. Ct. Appls. 37.)

[7] The prior ruling adverse to EPA in *Stauffer I* was disclosed in a footnote in a Memorandum of Law accompanying EPA's application for the warrant. (Jt. App. Ct. Appls. 47.) In support of its position, EPA cited dicta in a decision by a federal magistrate in North Carolina. In the cited case, the magistrate had held that Alcoa had waived its right to contest a similar warrant and that the dispute was moot because the warrant had been executed. See *Aluminum Co. of America* v. *EPA*, 663 F.2d 499, 500 (4th Cir. 1981). Compare EPA's Brief at 4 n.2.

EPA filed in federal district court a petition for an order to show cause why Stauffer should not be held in contempt. Stauffer simultaneously filed a motion to quash the warrant and an application for a temporary restraining order barring execution of the warrant. Stauffer's application for a temporary restraining order was mooted by EPA's agreement not to seek to execute the warrant pending the court's decision on the cross-motions.

On April 17, 1981, the Tennessee federal district court denied Stauffer's motion to quash and also denied EPA's contempt petition on the ground that "Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act" to perform inspections. (511 F. Supp. 750; Pet. App. 56a.) Stauffer promptly appealed, and after the district court refused to stay its decision and execution of the warrant pending appeal, Stauffer obtained a stay to that effect from the Sixth Circuit.

C. The Tenth Circuit Decision in *Stauffer I*

On May 8, 1981, three weeks after the Tennessee federal district court's decision in *Stauffer II*, the Tenth Circuit affirmed the Wyoming federal district court's decision in *Stauffer I* quashing the warrant there at issue and enjoining EPA from using contractors to make inspections at Stauffer's plants in Wyoming. *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981). The Tenth Circuit's decision rested squarely and solely on the ground that private contractors were not "authorized representatives" of EPA for purposes of Section 114(a)(2). *Id.* at 1079. EPA unsuccessfully sought rehearing.

D. The Sixth Circuit Decision in *Stauffer II*

Because of the Tenth Circuit's explicit ruling in *Stauffer I* that EPA had no right to designate private contractors to enter and inspect plants, the appeal to the Sixth Circuit from the Tennessee federal district court's decision focused both on whether EPA was collaterally

estopped from claiming such a right and on whether such a right existed.[8]

On July 7, 1982, the Sixth Circuit reversed the Tennessee federal district court, adopting two alternative grounds for its decision that the warrant should have been quashed. Each of the three judges wrote separately. Judge Weick, joined by Judge Jones, concluded that EPA was collaterally estopped from obtaining a warrant authorizing a private contractor to make the inspection, because of the prior decision in *Stauffer I* as affirmed by the Tenth Circuit. (684 F.2d 1179-81, 1190-92; Pet. App. 8a-13a, 34a-38a.) District Judge Siler, sitting by designation, did not agree that the doctrine of collateral estoppel applied. (684 F.2d 1192-93; Pet. App. 39a-41a.) Judge Siler joined Judge Weick, however, in concluding that Section 114(a)(2) of the Act does not permit EPA to designate contractors as its representatives for purposes of entry and inspection. (684 F.2d 1192; Pet. App. 39a.) Judge Jones did not reach this issue. (684 F.2d 1190; Pet. App. 34a.) Each judge thus joined in the result, and Judge Weick's opinion spoke for a majority of the court on each of the two alternative holdings.[9]

1. ***Collateral estoppel.***

Judge Weick observed that "[t]he facts in *Stauffer I* were identical to those in the instant case except they

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[8] The Wyoming federal district court in *Stauffer I* based its holding on alternative grounds, and for purposes of collateral estoppel its judgment initially was not necessarily conclusive as to either of the grounds standing alone. See *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168-73 (5th Cir. 1981); *Restatement (Second) of Judgments* § 27, comment i (1982). However, when the Tenth Circuit upheld the Wyoming federal district court's interpretation of the Clean Air Act, the judgment definitely became conclusive as to that ground. See *Hicks* v. *Quaker Oats Co.*, *supra*; *Restatement*, *supra*, comment o.

[9] In view of its disposition of the case on the two cited grounds, the court did not reach Stauffer's further claim that EPA could not obtain administrative search warrants on the basis of *ex parte* proceedings absent a showing of good cause for such proceedings. See EPA's Brief at 4 n.3.

arose in a plant of Stauffer's at a different location." (684 F.2d 1179, Pet. App. 9a.) In the circumstances, based on the principles of collateral estoppel set out in *Montana* v. *United States*, 440 U.S. 147 (1979), Judge Weick concluded that "there is no valid reason why they [*i.e.*, the questions decided in *Stauffer I*] should be relitigated a second time in the present case." (684 F.2d 1180, Pet. App. 12a.) He specifically considered whether the case fell within the exception for " 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana*, 440 U.S. at 162, *quoting United States* v. *Moser*, 266 U.S. 236, 242 (1924). Judge Weick noted that in applying the exception this Court in *Montana* had focused on the relative similarity of the actions in terms of subject matter, context and time. (684 F.2d 1181, Pet. App. 12a-13a.) Because the claims involved were so closely related as to be virtually identical, he accordingly did not apply the *Moser* exception. *Id.*

Judge Jones concurred, agreeing that "it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal." (684 F.2d 1190, Pet. App. 34a.) He also focused on answering the following two questions posed in *Montana*, 440 U.S. at 155:

> (1) "whether controlling facts or legal principles have changed significantly" since the judgment in the prior suit; and (2) "whether other special circumstances warrant an exception to the normal rules of preclusion."
>
> (684 F.2d 1190, Pet. App. 35a.)

Judge Jones found neither factor to be present. He considered specifically whether any injustice would result from precluding EPA from using contractors to enter Stauffer's plants, while not estopping EPA as to competitors' plants. He concluded that a greater injustice would arise as a result of according different treatment to Stauffer plants in different locations. (684 F.2d 1191,

Pet. App. 36a.)[10] He also observed that the other two members of the panel had reached the merits and had resolved the statutory question against EPA, so all plants in the Sixth Circuit stood on the same footing in any event. (684 F.2d 1191, Pet. App. 37a.) In addition, while Judge Jones approved generally of the practice of agency relitigation of legal issues, he concluded that in cases *of defensive use* of estoppel *where mutuality was present*, *i.e.*, where the parties to the cases were the same, this factor should not be controlling. (684 F.2d 1191-92, Pet. App. 38a.) As he said:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication.
> (684 F.2d 1192; Pet. App. 38a.)

Judge Siler would not have applied collateral estoppel. He would have given controlling weight to permitting agencies to relitigate legal issues,[11] and he also considered that an injustice may arise if EPA were precluded from using contractors to inspect Stauffer's plants but

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[10] Judge Jones explained (*id.*):

> In my opinion, the injustice, if any, is suffered by Stauffer whose plants and trade secrets in one area will be protected, while in another, private individuals will be able to enter and inspect its facilities. To prevent such an anomaly, collateral estoppel should be applied.

Judge Jones explicitly drew an analogy between this case and *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), a case involving alleged violations of OSHA's noise regulations. The manufacturer had prevailed in a prior proceeding involving alleged violations of the same regulation at different plants. The Seventh Circuit approved defensive use of collateral estoppel by the manufacturer to block the subsequent proceedings by OSHA. See 684 F.2d 1191 n.2, Pet. App. 36a n.2.

[11] In this connection, Judge Siler relied particularly on *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980). But see the discussion *infra* at 26 & n.23.

not those of its competitors. (684 F.2d 1192, Pet. App. 40a-41a.)

2. EPA's "representatives" for purposes of entry under Section 114(a)(2).

Judge Siler nonetheless concurred with Judge Weick that on the merits EPA had no authority to designate contractors as its "representatives" to enter and inspect plants under Section 114(a)(2). He emphasized the lack of express authority for such a radical departure from the common-law principle that only governmental officers could conduct searches:

> Where the federal government has embarked upon a policy so radically divergent from its standard policy, that is, having only government officers or employees executing search warrants and inspecting plants, it seems that authority for such conduct should be clear from the Act itself or from legislative history.
>
> (684 F.2d 1192-93, Pet. App. 41a.)

Judge Weick meticulously parsed the statutory language and the legislative history. He noted that the statute did not define "representative" and rejected EPA's plain-meaning argument. *Id.* He explored the background for the fact that the language "authorized representative" enacted in the 1970 Amendments to the Clean Air Act came from the Senate version in place of a reference to "officers or employees" in the corresponding House bill. He pointed out that the Conference Report described the competing phrases in equivalent terms, referring to "DHEW personnel" and "DHEW investigative personnel," respectively. (684 F.2d 1183-84, Pet. App. 18a-20a.)[12]

Judge Weick also drew assistance from the statutory context. He noted that one other part of Section 114 uses the term "representatives" in connection with EPA's

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[12] The Department of Health, Education and Welfare was then responsible for administering the Clean Air Act. These duties were transferred to EPA upon its creation.

entry and search powers. Section 114(d), added by the 1977 Amendments to the Act, requires "the Administrator (or his representatives)" to give notice to the applicable state pollution control agency before making an inspection under Section 114(a)(2). Given the sensitive nature of the intergovernmental communication involved, he considered that this function "necessarily envisions EPA employees." (684 F.2d 1184, Pet. App. 21a.) He concluded that the term "representative" should be given the same meaning in both Sections 114(a)(2) and (d). *Id.*

Judge Weick distinguished Section 114(c), which refers to "representatives of the United States" rather than of the Administrator. That provision allows EPA to disclose confidential information to "other officers, employees, or authorized representatives of the United States" where necessary to carry out their duties. He considered that a broader category of persons could receive confidential information as "representatives of the United States" for purposes of Section 114(c) than could exercise entry and search authority as a "representative" of the Administrator under Sections 114(a)(2) and (d). (684 F.2d 1185, Pet. App. 22a.) Judge Weick also opined that if the term "representative" in Section 114(a)(2) meant persons other than EPA employees, the "absurd result" would arise that only the Administrator and private contractors could make inspections, but EPA employees could not. *Id.*

As the Tenth Circuit had done in *Stauffer I*, Judge Weick also gave weight to the legislative history of the adoption in 1972 of a provision in the Federal Water Pollution Control Act (now "Clean Water Act") providing for entry and inspection by EPA in terms virtually identical to those of Section 114(a)(2) of the Clean Air Act. The Senate Report of the bill which was the basis of final enactment of the provision states:

> It should also be noted that *the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which*

> *such representatives must be full time employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
>
> (684 F.2d 1187, Pet. App. 27a, *quoting* S. Rep. No. 414, 92d Cong., 1st Sess. 63 (1971), *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).)

Judge Weick noted that the court in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981), had dismissed this statement, but he considered that this was an exceptional case where post-enactment legislative history was useful. He observed that the statement provided an authoritative construction of the nearly identical provision in the Clean Water Act, and that the provision was explicitly modeled by Congress after Section 114(a)(2) of the Clean Air Act. The provisions in the two Acts were in *pari materia* with one another and should be given a congruent construction. In addition, he pointed out that the statement regarding the provision in the Clean Water Act was made by the same committee and came "a scant ten months" after enactment of the 1970 Amendments to the Clean Air Act. (684 F.2d 1187, Pet. App. 28a.)

Judge Weick also rejected claims by EPA that Congress had ratified use of contractors for searches by failing to amend Section 114(a)(2) and by making appropriations that included funds for use of contractors. (684 F.2d 1189, Pet. App. 31a-33a.)

Finally, like Judge Siler, Judge Weick observed that "the execution of search warrants is a traditionally governmental function." (684 F.2d 1189, Pet. App. 33a.) He pointed out that Congress had amended the entry and inspection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6927(a), to expand the persons who could make searches, and that the legislative history of that amendment expressly referred to private contractors as being among those who were newly eligible to conduct inspections. (684 F.2d 1188, Pet. App. 29a-30a.) In his view, given the strong tradition of conducting

searches only by governmental officials, the absence of any similar expression of congressional intent regarding the Clean Air Act was instructive.

3. Denial of rehearing.

A petition by EPA for rehearing and rehearing en banc was denied. (684 F.2d 1193, Pet. App. 42a-43a.) In denying rehearing, the court commented that "a private contractor . . . may have an axe to grind and may be interested in obtaining trade secrets of Stauffer." *Id.*

SUMMARY OF ARGUMENT

A. Collateral Estoppel

This case concerns "defensive" use of collateral estoppel by a private party faced with successive, contemporary, virtually identical demands by a governmental agency. In this case from the Sixth Circuit, each judge separately, and properly, concluded that the case arose on facts and circumstances nearly the same as those before the federal district court in Wyoming and the Tenth Circuit in *Stauffer I*. There EPA had fully and fairly litigated the legal question whether it had authority to use a private contractor as its "representative" to enter and search plant premises—and it had lost. Under the principles of collateral estoppel set out in *Montana* v. *United States*, 440 U.S. 147 (1979), EPA cannot relitigate this same question in this parallel case.

There is no basis for EPA's contention that this case falls within the exception for "'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana*, 440 U.S. at 162, *quoting United States* v. *Moser*, 266 U.S. 236, 242 (1924). As explained in *Montana*, the *Moser* exception turns on whether a legal issue arises in comparable circumstances, considering subject matter, context and time. As the court of appeals determined, this case is strikingly parallel to *Stauffer I* in *all* respects, not just the parties and the issue as EPA claims. The differences relate only to location (the plants were in different states) and the identity of the contractors. Neither detail has any legal significance whatsoever.

Moreover, as the maker of the successive demands, EPA controlled the forums involved and the timing. EPA's brief attributes the remarkable congruence of the cases to "pure coincidence." EPA's Brief at 18. However, in *Stauffer I* the Wyoming federal district court concluded that EPA had chosen to develop a "test case," and in this case Judge Jones believed that EPA wanted to "test its policy decisions" and to do so "the same defendant [wa]s sued *in seriatim*." (684 F.2d 1192, Pet. App. 38a.) Particularly in these circumstances, EPA has no grounds to complain about being collaterally estopped by the judgment in *Stauffer I*.

The crux of EPA's argument is that the principles announced in *Montana* should be limited so as not to apply to "recurring questions of public law." EPA's Brief at 22-31. This proposed exception sweeps so broadly that it would virtually swallow the entire *Montana* doctrine. The government's special role in enforcing federal laws is beyond question, but that role does not exempt an agency such as EPA from *any* application of collateral stoppel *whatsoever*. Instead, a court faced with successive suits on the same question or right should consider the government's role simply as one of the factors used in making the balancing calculus explained in *Montana*.

Where, as here, collateral estoppel is being used *defensively by a party* to the prior litigation, the goverment should be estopped in its successive suit. The government's special role is outweighed by the countervailing considerations of conclusive resolution of disputes, conservation of judicial resources, and protection of a prevailing defendant against expensive and vexatious multiple actions. Since *Montana* was decided, the courts of appeals have uniformly concluded that collateral estoppel may appropriately be invoked defensively by a party faced with successive government suits. Where the government's successive demand is comparable in all significant respects, defensive use of estoppel fosters fairness and equal treatment.

B. EPA's "Representatives" Under Section 114(a)(2)

Section 114(a)(2) of the Clean Air Act does not authorize EPA to designate private contractors as its representatives for purposes of obtaining and executing administrative search warrants. The Section was enacted as part of the Clean Air Act Amendments of 1970. Every indication of legislative intent points toward an interpretation of Section 114(a)(2) that would require EPA to use only its own employees to enter, search and inspect private premises. The Senate and House versions of the provision were described in the conference report as authorizing entry and searches by "DHEW personnel" and "DHEW investigative personnel," respectively. (The Department of Health, Education, and Welfare was EPA's predecessor.) Moreover, the Senate bill from which the language of Section 114(a)(2) was drawn uniformly and consistently used the term "representative" to refer to designated EPA employees.

Shortly after the enactment of the 1970 Amendments to the Clean Air Act, Congress expressly used Section 114(a)(2) as a model in adding an entry and search provision to the Clean Water Act. That provision, Section 308(a)(B) of the Clean Water Act, added by the Federal Water Pollution Control Act Amendments of 1972, is virtually identical to Section 114(a)(2). The legislative history of the provision in the Clean Water Act states explicitly that "authority to enter, as under the Clean Air Act, is reserved to the Administrator and . . . full time employees of [EPA]." The provisions in the two Acts thus are *in pari materia* and should be construed in the same manner.

The statutory context also supports construing the term "representative" in Section 114(a)(2) to mean designated EPA employees. The same term is used in Section 114(d) to designate the persons who are to give notice to state officials of an entry and inspection under Section 114(a)(2). The court of appeals correctly concluded Congress necessarily envisioned that this sensitive intergovernmental communication would be made by EPA officials, not private contractors.

A different provision, Section 114(c), relates to handling of confidential information and refers to "authorized representatives *of the United States*," not of EPA. (Emphasis added.) The use of the term "authorized representatives" in Section 114(c) serves an entirely different purpose than does the usage in Sections 114(a)(2) and 114(d). The broader reference in Section 114(c) allows EPA to pass confidential information to personnel of other federal agencies, to federal courts, and to state officials exercising transferred federal authority, notwithstanding restrictions which otherwise would be imposed by the Trade Secrets Act and the Federal Reports Act. EPA's argument that the broader usage in Section 114(c) should be imported into the entry and inspection provisions was properly rejected by the court of appeals.

No other federal agency has attempted to use private contractors to enter private premises and conduct searches and inspections. Based on centuries of experience, the English and American common law specifically has barred private persons from making governmental searches. These well-established usages and understandings necessarily formed the basis of Congress' legislative consideration of Section 114(a)(2). As Judge Siler wrote in the court of appeals, EPA's use of private contractors is "radically divergent" from past government usage and common-law principles, and to be valid "authority for such conduct should be clear from the Act itself or from legislative history." (684 F.2d 1192-1193, Pet. App. 41a.) There is no such authority.

ARGUMENT

I. DEFENSIVE USE OF COLLATERAL ESTOPPEL IS APPROPRIATE IN THIS CASE WHERE THE PARTIES INVOLVED AND THE RIGHT AT ISSUE ARE IDENTICAL TO THOSE IN THE PRIOR LITIGATION, AND THE CASE ARISES ON INDISTINGUISHABLE FACTS

The court of appeals properly considered this case to be controlled by the principles of collateral estoppel set out in *Montana* v. *United States*, *supra*, 440 U.S. at 153-

154.[13] Like *Montana*, this case concerns "defensive" use of collateral estoppel regarding a legal question which is "in substance the same as [in the prior litigation]." *Montana*, 440 U.S. at 155. Moreover, in *Montana* the parties to the prior and subsequent litigation were in practical effect the same. *Id.* at 154-155. In this case, they are identical. Also, the Court in *Montana* made a careful analysis of whether the controlling facts or law had changed significantly from the prior litigation. *Id.* at 155, 158-62. Here, the court of appeals undertook a comparable analysis and concluded that no such differences existed.

This case thus boils down to the question whether the *Montana* principles should be limited, so as not to apply in cases involving "recurring questions of public law."

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[13] In *Montana*, this Court outlined the general policies underlying collateral estoppel as follows:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana*, 440 U.S. at 153-154.

The *Restatement (Second) of Judgments* § 27 (1982) defines the doctrine in terms that reflect these policies:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See also *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48-49 (1897); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877).

No question has been raised here or in the Sixth Circuit concerning (1) EPA's full and fair opportunity to litigate in the Wyoming federal district court and the Tenth Circuit, (2) the actual litigation of the statutory contractor-search question in those courts, (3) the determination of the question in a valid and final judgment by those courts, and (4) the essentiality of such determination to the judgment of the Wyoming federal district court as affirmed by the Tenth Circuit.

EPA's Brief at 22-31.[14] The government's invitation so to limit *Montana* should be rejected, at least in the circumstances of this case. This Court's precedents, a uniform line of cases in the courts of appeals, and the *Restatement (Second) of Judgments* ("*Restatement*") all demonstrate that there is no basis for such a broad exception to the *Montana* principles, *where collateral estoppel is invoked defensively by a party to the prior suit.* One party should not be subjected to successive suits by another party regarding the same question or right, even if the persistent plaintiff is a federal agency.

A. Defensive Use Of Collateral Estoppel Where The Same Parties Were Subject To The Prior Judgment Is The Most Compelling Case For Invocation Of The Doctrine

Montana was a case in which this Court approved the *defensive* use of collateral estoppel against the government *by a party* to the prior litigation.[15] Contemporaneously, the Court decided *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), a case in which the Court approved *offensive* use of collateral estoppel by a non-party to the prior litigation. In so doing, the Court explored the differences between offensive and defensive use of the doctrine,[16] and noted that offensive use of collateral estoppel is not so readily applied as defensive use. As the Court

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[14] The government acknowledges that it is seeking a significant reassessment of *Montana*. See EPA's Brief at 30-31.

[15] *Montana* thus is a direct precedent for the decision in the instant case, as the court of appeals determined. See *supra*, at 9.

[16] The Court defined the two uses as follows:

> In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.
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> *Parklane*, 439 U.S. at 326 n.4.

observed, "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does" (*id.* at 329), and offensive use has a greater likelihood of being unfair to the party against whom the doctrine is being invoked. See *id.* at 330-31.

In short, reservations applicable to offensive use of collateral estoppel do not pertain to defensive use, especially where the parties are the same. This Court, like other courts, accordingly has been more willing to apply collateral estoppel defensively.[17]

B. The Right Or Question At Issue Here Is In All Legally Significant Respects The Same As In *Stauffer I*

Each judge of the court of appeals separately concluded that the issue presented in this case was identical to that resolved in *Stauffer I*.[18] The government nonetheless argues that "this case is governed by the exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on *substantially un*related claims." EPA's Brief at 15 (emphasis added). The few differences which exist, however, have no legal significance whatsoever. EPA's "demands" that private contractors be admitted to the plants to carry out inspec-

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[17] An earlier decision, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), involved defensive use of collateral estoppel where the parties to the subsequent litigation were not the same as those in the earlier litigation, *i.e.*, mutuality was not present. See *Parklane*, 439 U.S. at 327-29.

For a discussion of the sharp distinction drawn by courts of appeals between the two uses in the context of regulatory litigation involving the government, see *infra* at 26-28 & nn.23-26.

Notably, the question of collateral estoppel posed in *United States* v. *Mendoza*, No. 82-849, concerns *offensive* use of collateral estoppel where *mutuality of the parties is not present.*

[18] As Judge Jones commented, "[i]n the instant case, it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal." (684 F.2d 1190, Pet. App. 34a.)

tions were strikingly congruent in time, subject matter, and factual context, as the court of appeals determined.

The exception at issue stems from *United States* v. *Moser*, 266 U.S. 236, 242 (1924), where it was formulated as follows:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.
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> *Id.* (emphasis as supplied by the Court in *Montana*, 440 U.S. at 162).

The Court in *Montana* remarked that the scope of this exception "may be difficult to delineate." 440 U.S. at 163. It generally observed that preclusion may be inappropriate "when issues of law arise in successive actions involving unrelated subject matter" (*id.* at 162), and also looked to the alignment in time of the successive claims. *Id.* at 163. See also *Restatement*, § 27 at 264-65 (Reporter's Note);[19] *id.* § 28, comments b and c; and *id.* at 285-86 (Reporter's Note).

Here, the events giving rise to the legal issue were parallel in both time and subject matter. As Judge Weick pointed out, "[t]he facts in *Stauffer I* were identical to those in the instant case except they arose in a

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[19] The Reporter's Note to Section 27, at 264-65, states as a general proposition that—

> issue preclusion may apply even though the events involved in the two proceedings took place at different times (or the question was one of status or condition at different time periods) if the facts are sufficiently similar or identical for purposes of the applicable rule of law. See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4417.

plant of Stauffer's at a different location." (684 F.2d 1179, Pet. App. 9a.) Both cases occurred early in 1980, at the advent of EPA's "overview inspection program" designed to audit state enforcement efforts. See *supra*, at 3, 6. Both inspections by contractors were planned in conjunction with that program. EPA had designated each of the contractors as its "representative" for purposes of entry under Section 114(a)(2) of the Act. In each instance, the contractors were accompanied by EPA and state officials who were themselves capable of conducting such inspections and who had actually conducted such inspections previously.[20] Stauffer each time welcomed inspection by the EPA and state officials. In each case, Stauffer attempted to negotiate an agreement to protect trade secrets, but in each case an administrative search warrant was issued on an *ex parte* basis before the negotiations had been resolved.

The differences concern only location (the two plants are in different states and thus in different EPA regions and different federal judicial districts) and the identity of the contractors involved.[21] Neither in *Stauffer I* nor in this case did the courts attach any legal significance whatsoever to these differences. There is, in short, a remarkable identicality to *Stauffer I* and this case, in time, subject matter, and factual setting. In sum, EPA has utterly no basis for its assertion that "the court of appeals . . . appears to have relied entirely upon the identity of parties and the common legal question." (EPA's Brief at 17.) To the contrary, after a detailed and careful comparative evaluation of the circumstances in the two cases, the court of appeals properly concluded

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[20] This circumstance, coupled with the others, led the courts in both *Stauffer I* and this case to believe that EPA was seeking a "test case." See *supra*, at 5 n.5 & 10, and *infra*, next page.

[21] EPA itself attached little importance to the identity of the contractors. In each instance, it provided no information regarding the nature of the contracting company, and very little material respecting the specific employees of the contractor who were involved. See Jt. App. Ct. Appls. 18-20, 37-38.

that EPA's demands were not "substantially unrelated" for purposes of the *Moser* exception. See *supra*, at 9.

Moreover, in this case of defensive use of collateral estoppel, EPA made the successive demands and had complete control over the forums and timing. EPA's brief refers to "coincidence," stating that "the fact that both inspections involve plants operated by respondent is pure coincidence" (EPA's Brief at 18), and also that "the government made no such tactical decision to engage in duplicative litigation." *Id.* at 20. The fact is, however, that in *Stauffer I* the Wyoming federal district court determined that "EPA's counsel apparently wanted to make this a test case." 14 Env't Rep. Cas. (BNA) at 1741 (¶ 3). And similarly in *Stauffer II*, as EPA in its brief protests, Judge Jones suggested "that EPA has deliberately embroiled respondent [Stauffer] in multiple litigation in order to 'test its policy decisions in more than a single circuit, in circumstances where the same defendant is used *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment.'" EPA's Brief at 21 n.11, *quoting* 684 F.2d 1192, Pet. App. 38a. Amazingly, at one point in EPA's brief it tries to shift the onus for the remarkable "coincidence" to Stauffer by saying that its efforts to defend itself by filing motions to quash the warrants gave rise to the successive disputes. EPA's Brief at 20.

The Sixth Circuit's analysis in this case is consistent with the manner in which other courts of appeals have applied the *Moser* exception, as explained in *Montana*. For example, in *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), the court had before it successive prosecutions by OSHA of citations against Continental Can for alleged violations of the agency's noise regulations. The court had no difficulty in determining that the same issue was in dispute and that the circumstances were sufficiently related to apply collateral estoppel defensively, even though different plants were involved. See *id.* at 595-96. Similarly, in *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979), the government

was collaterally estopped from assessing tax deficiencies because of its loss of a prior case against the taxpayer's son involving different transactions based on the same contract. See *id.* at 1344-1350. See also *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982) (IRS estopped from asserting a deficiency for 1971 tax year by prior judgment in case concerning 1967 tax year); *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980). (EPA collaterally estopped in enforcement action against pulp mill by prior judgment in state enforcement action).[22]

These recent cases, all decided after *Montana* and *Parklane Hosiery*, involve defensive use of collateral estoppel against the government. They thus deal with situations where, as here, the government controls the successive litigation. See also *Montana*, 440 U.S. at 163 (government chose forum and claims in both cases). In each case, the events at issue in the subsequent litigation were somewhat different from those in the prior case. In applying *Moser* as explained in *Montana*, the courts focused on the legal significance of the similarities and differences between the successive cases. See *Restatement*, § 28 at 286 (Reporter's Note), *quoted infra*, at 30 n.28.

Like the other courts of appeals in *Continental Can*, *Starker*, *Union Carbide* and *ITT Rayonier*, the Sixth Circuit in this case properly concluded that the exception formulated in *Moser* has no application where the same

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[22] In *Starker*, the court characterized the case as involving offensive rather than defensive use of collateral estoppel, presumably because the party urging estoppel was the plaintiff. The government, however, had initiated the case by assessing the tax deficiency.

Starker and *Union Carbide* are arguably inconsistent with *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974), but *Divine* did not turn on any lack of relationship in the demands involved. Instead, *Divine* (decided before *Montana* and *Parklane Hosiery*) turned on "special factors relating to tax litigation." *Id.* at 1057 (Friendly, J., concurring and dissenting). See the discussion of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), in *Restatement*, § 27 at 265 (Reporter's Note).

question or right arises in successive litigation on related facts that differ in no legally significant respect.

C. Where Collateral Estoppel Is Invoked Defensively By A Party To The Prior Suit, The Government May Be Precluded From Relitigating A Potentially Recurring Question Of Public Law

Collateral estoppel may not be invoked where "special circumstances warrant an exception to the normal rules of preclusion." *Montana*, 440 U.S. at 155. The government argues strenuously here and in *United States* v. *Mendoza*, No. 82-849, that such special circumstances do exist—specifically, that "collateral estoppel should not be applied against the government to preclude [*re*]determination of recurring questions of public law." EPA's Brief at 22 (heading; capitals omitted). The government points to its unique functions in enforcing public laws, and argues that application of collateral estoppel to it "would freeze the development of the law." *Id.* at 24. This characterization and argument sweeps much too broadly. The government's special role in enforcing federal laws is beyond question, but that role does not exempt EPA or any other federal agency from application of collateral estoppel in any and all circumstances whatsoever. Instead, the court before which the successive litigation is pending should carry out its balancing calculus by including the government's role as simply one of the factors being evaluated. In the particular circumstances of this case, where collateral estoppel is being used defensively by a party to the prior suit, the government's role is outweighed by other factors, as the court of appeals found.

1. *Collateral estoppel applies where the government brings successive suits against the party who prevailed in prior litigation.*

It is instructive that the government's argument on this point proceeds largely on the basis of considerations and authorities pertinent to *offensive use* of collateral estoppel, often *by a non-party* to the prior litigation.

See EPA's Brief at 26, 32 & n.18.[23] Where, as here, collateral estoppel is being used *defensively by a party to the prior litigation*, courts of appeals have upheld its use notwithstanding the government's reliance on its special role as a countervailing factor.[24]

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[23] Those considerations apply to *United States* v. *Mendoza*, No. 82-849, but not to this case.

The *Restatement*, §§ 27-29, mentions but does not develop the distinctions between offensive and defensive use of collateral estoppel. See *id.* § 29, comments d and e, at 293-94. Instead, it iterates considerations which bear generally on applying the doctrine in both usages.

The leading decision by a court of appeals denying offensive use of collateral estoppel in a regulatory context is *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803 (9th Cir. 1980). Oil and gas companies and their trade association sought review of an EPA regulation designating certain areas of California as not meeting federal air quality standards. Judge Sneed's opinion for the court recognized specifically that "offensive" use of collateral estoppel was at issue (*id.* at 808-09) and that the government's interest in relitigation was a strong countervailing consideration insofar as *that use* was concerned. *Id.* The court considered that *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), discussed *supra*, at 24, was "not inconsistent" with *Western Oil & Gas* because *ITT Rayonier* involved defensive use of estoppel by a party to the prior case. 633 F.2d at 810 n.8. In this very same context, the court observed that "[w]e do not hold that an agency may never be bound by a prior determination." *Id.*

All of the decisions cited in EPA's Brief at 32 n.18 involve circumstances comparable to *Western Oil & Gas*, as EPA itself acknowledges in that footnote.

[24] The government acknowledges that the identity of the parties in the successive suits is a valid consideration in applying the doctrine. EPA's Brief at 26.

The *Restatement* continues to separate principles relating to relitigation "between the parties" (§§ 27, 28) from those concerning "Issue Preclusion in Subsequent Litigation with Others") (§ 29, heading). In effect, Section 29 of the *Restatement* sets out additional considerations that should be addressed before non-parties to the prior litigation may be allowed to invoke collateral estoppel. Much of the argument reflecting the *Restatement* in EPA's Brief rests on Section 29, and thus concerns the further considerations applied when non-parties seek to invoke the doctrine. See EPA's

The decision in *American Medical International, Inc. v. Secretary of HEW*, 677 F.2d 118 (D.C. Cir. 1981), illustrates these distinctions. There, the Health Care Financing Administration had denied reimbursement of certain costs that American Medical and some of its subsidiaries and affiliates had allegedly absorbed while furnishing health care to beneficiaries of the Medicare program. In a prior litigation in the Court of Claims, the reimbursability of one category of costs had been resolved against the government. The D.C. Circuit first addressed the question whether "federal relitigation of questions of national law with *new parties* in new circuits should be permitted." *Id.* at 122 (emphasis added). It concluded that in those circumstances, collateral estoppel should not be applied. However, the court then turned to the circumstances where a party to the prior suit was seeking to invoke collateral estoppel against the governmental party to the first suit. In that situation, the court opined that it ordinarily would apply the doctrine:

> The foregoing analysis [concluding collateral estoppel should not apply] intercepts only parties who did not participate in the initial suit. *If the government is litigating with the same adversary in both cases, an estoppel will petrify the law only as to that one party—obviously not an unjust result—and accordingly will work no preclusion generating national shockwaves.*
>
> *Id.* at 124 (emphasis added).

The court then evaluated whether other special circumstances should affect application of the doctrine.[25]

Brief at 26, citing the *Restatement* at § 29(7) and comment *i*. The commentary to the *Restatement* explicitly cautions that the exceptions to application of the doctrine are more rigorously applied in the case of non-parties. See Restatement, § 29, comment b, at 292-93.

[25] It happened that the prevailing party in the initial suit had been a subsidiary which was later merged into American Medical. In this unusual setting the court found that it would be unfair to apply one rule of decision to American Medical as successor com-

The analysis in *American Medical* of the general propriety of defensive use of collateral estoppel by parties to the prior litigation is in accord with the decision in the present case and with the decisions of other courts of appeals in *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979) (successive suits by OSHA alleging violations of its noise regulations), and *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) (successive suits alleging violation of water pollution requirements).[26] In each case, a governmental agency had brought successive suits against the same private party regarding the same issue. In these situations, courts have considered that the government's valid interest in relitigating issues was outweighed by the private party's interest in not having to defend itself in successive suits regarding an issue previously resolved in its favor. As Judge Jones succinctly put the matter:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication. Thus, in my opinion, application of the rule is proper.
>
> (684 F.2d 1192, Pet. App. 38a.)

2. *Defensive use of collateral estoppel by a party to the prior litigation fosters fairness.*

The court of appeals correctly concluded that it would be fairer in this case to apply collateral estoppel than not to do so. See *supra*, at 9. The government argues here, as it did in the court of appeals, that applying collateral estoppel would be unfair because Stauffer would consequently enjoy a more advantageous position than other

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pany and another rule to the subsidiaries who had not been party to the initial case. 677 F.2d at 124.

[26] See also *supra*, at 23-24, discussing *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), and *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979).

persons. EPA's Brief at 27. This argument proceeds from the implication that Stauffer fortuitously "happened to be involved in the prior case decided against the government" (*id.*), and ignores the uncontested facts (1) that EPA initiated both the first and the second cases against Stauffer, (2) that in the prior case EPA fully and fairly litigated the question at issue, and (3) that EPA lost. EPA in effect wants a second bite at the same apple, in a forum and setting of its own choosing. In contrast, under the approach adopted by the court of appeals, Stauffer is no more favored than any other party subject to regulation under the Act—all have an opportunity equivalent to that Stauffer had, to defend themselves in litigation on the question with EPA, fully and fairly.[27]

In these circumstances, the strong judicial interest in "conclusive resolution of disputes within their jurisdictions" (*Montana*, 440 U.S. at 153) comes most directly to bear. Conservation of judicial resources and protection against the expense and vexation of multiple lawsuits are weighty factors which do not just evaporate because the government is the plaintiff bringing the successive suits. See *id.*

Moreover, as Judge Jones correctly pointed out in the court of appeals, as a practical matter Stauffer's position is indistinguishable insofar as administration of the law is concerned from that of any other potentially affected party in the Sixth and Tenth Circuits. As he said, while EPA "*technically* retain[s] the power" to assert it has a

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[27] These same considerations were addressed by the District of Columbia and Seventh Circuits in *American Medical*, 677 F.2d at 124, and *Continental Can*, 603 F.2d at 595, with results which accord with the decision by the court of appeals in the present case. EPA's citation of the *American Medical* decision as supporting its position ignores the analysis by that court, quoted *supra*, at 27, and the fact that a corporate merger affected the result there.

Of course, other parties in litigation with EPA on the issue in the Sixth and Tenth Circuits would now have the advantage of being able to contend that *stare decisis* binds the court in determining the question.

right to use private contractors to conduct a search in those circuits, *stare decisis* in effect binds the courts in those areas to apply the law as announced in *Stauffer I* and *Stauffer II*. (684 F.2d 1191, Pet. App. 37a (emphasis in original).) Realistically, there is no "special private law" for Stauffer. EPA's Brief at 28. Instead, the law as interpreted in *Stauffer I* and *Stauffer II* applies to all persons in the Sixth and Tenth Circuits.

Whether Stauffer may invoke collateral estoppel when faced with a demand by EPA that private contractors carry out an inspection at a plant in another circuit would depend upon the degree of similarity of the new demand with the circumstances involved in *Stauffer I* and *Stauffer II*.[28] The case before the Court now is *Stauffer II*, however, and the determination regarding application of collateral estoppel depends on the circumstances at hand, not those that speculatively might arise in still further successive litigation between the same parties.[29]

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[28] Section 28 of the *Restatement* states the relevant exception in terms of the relationship of the successive demands (EPA's Brief at 27 sets out a partial quote of Section 28(2)):

> [R]elitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . .

The Reporter's Note to Section 28(2) observes that the resolution of a legal question "in a proceeding between two litigants is not binding on them for all time with respect to all claims that may arise between them." *Id.* at 286. Instead, the considerations of relationship that pertain to the *Moser* exception should be addressed in the subsequent case. *Id.*

[29] *E.g.*, the decision in this case need not necessarily resolve the hypothetical question posed by EPA's Brief at 29 n.14 regarding whether Stauffer could collaterally estop EPA from using private contractors to enter and inspect its plants within the Ninth Circuit, notwithstanding that Circuit's contrary decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981). The setting in which

Finally, it is sophistic to argue as EPA does that "[b]y engaging in a regulated business within the various judicial circuits, . . . respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question. . . ." EPA's Brief at 29. In establishing its business enterprise, Stauffer did not consciously consider that it would be subjecting itself to "test cases" initiated *in seriatim* by EPA. See *supra*, at 23. Despite the reference to "coincidence" in EPA's brief, the striking similarities in these cases and the circumstance that EPA on each occasion refused to conduct the inspection with its own qualified officials at least suggest that here, as in *Montana*, there was "a deliberate effort to pursue parallel litigation on indistinguishable claims." EPA's Brief at 30.

D. The Other Considerations Cited By EPA Do Not Affect Application Of Collateral Estoppel In This Case

EPA's Brief cites three other considerations as weighing against application of collateral estoppel: (1) the Solicitor General's discriminating selection of cases to bring to this Court for review, (2) the existence of the conflicting decision of the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, *supra*, and (3) the fact that the question at issue in these cases arises under "our complex environmental laws." EPA's Brief at 24-25, 30-32. None of these factors affects application of collateral estoppel in this case.

Regarding the Solicitor General's commendable selectivity in bringing cases to this Court for review, the government proffers the observation that the Solicitor General typically cannot predict the nature of future litigation and thus cannot know the risk that an adverse judgment may be binding in future cases:

> At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek

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EPA brought such a further successive demand would be determinative.

> review in this Court of an adverse judgment, it *typically* is impossible to determine whether future litigation will arise in a case involving the same party or a different party.
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> EPA's Brief at 30 (emphasis added).

This is not a *typical* case, however. At the time EPA's petition for rehearing was denied by the Tenth Circuit in *Stauffer I*, and further review could be had only in this Court, *Stauffer II* had not only already been brought, it was already pending on appeal in the Sixth Circuit. The Solicitor General had to know *in this particular case* of the actual existence, not just the future prospect, of litigation between the same two parties.[30]

Similarly, the existence of the conflicting decision in *Bunker Hill* should not affect Stauffer's ability to invoke *Stauffer I* in this successive litigation. In *Stauffer I* both EPA and Stauffer already had a full and fair opportunity to litigate the question involved *directly against each other* in a virtually identical context. The *Bunker Hill* decision itself neither added any new element to this context nor worked any other intervening change in it. See *Restatement*, § 28(2).

Finally, there is no principled basis for carving out environmental statutes from the application of normal principles of collateral estoppel. Compare *Continental Can*; *ITT Rayonier*; and *Western Oil & Gas Ass'n* v. *EPA*, with EPA's Brief at 31-32 & n.18.

II. SECTION 114(a)(2) OF THE CLEAN AIR ACT DOES NOT AUTHORIZE EPA TO DESIGNATE PRIVATE CONTRACTORS TO ENTER, SEARCH, AND INSPECT PLANTS

Section 114(a)(2) of the Clean Air Act authorizes entry and inspection of premises subject to regulation under the Act, in the following terms (emphasis added):

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[30] Generally, the Solicitor General's circumspection in seeking review might have a bearing on whether a *non-party* to the prior litigation could make *offensive* use of collateral estoppel, but for the reasons set out *supra*, at 25-28, it should not affect *defensive* use of collateral estoppel by the prevailing *party* to the earlier case.

> [T]he Administrator *or his authorized representative*, upon presentation of his credentials—(A) shall have a right of entry to, upon, or through any premises of such person [who owns or operates an emission source] or in which any records required to be maintained under paragraph (1) of this section are located . . . .

The question of statutory construction presented by this case is whether EPA may designate a private contractor as its "authorized representative" for purposes of entering, searching, and inspecting a plant.

A. Congress Used The Term "Authorized Representative" Of EPA In Section 114(a)(2) To Mean Only Specially Authorized Officers Or Employees

1. *The legislative history of the 1970 Amendments to the Clean Air Act demonstrates Congress' intent to accord entry authority only to designated government employees.*

The term "authorized representative" is not expressly defined in the Clean Air Act.[31] The legislative history of Section 114(a)(2), however, amply demonstrates Congress' intention that searches of private premises be performed only by properly authorized EPA employees.

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[31] EPA's argument that a "plain meaning" of the term includes private contractors is without foundation. An equally acceptable "plain meaning" of the terms would be that authorized representatives are a limited class of employees of EPA, *i.e.*, those employees authorized by the Administrator to conduct inspections. This alternative "plain meaning" better comports with the common law understanding of the persons capable of carrying out the governmental function of searches and inspections, and it has the advantage of being amply supported by explicit legislative history. See *infra*.

Notably, in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), this Court rejected a definition of the term "representative" identical to that proffered by EPA here, based on an analysis of congressional intent and the context in which the term was used. Cf. EPA's Brief at 34 n.20. Also, EPA ignores the statutory context when it says the term "representative" as used in Section 114(a)(2) "does not carry any implication of an employment relationship." *Id.* at 34.

The entry provision in Section 114 was adopted as part of the Clean Air Act Amendments of 1970. The House and Senate versions of the provision used different terms to describe who had entry authority. The House bill consistently used the phrase "officers or employees." See H.R. 17255, 91st Cong., 2d Sess. § 112(f) (1970), *reprinted in A Legislative History of The Clean Air Amendments of 1970* ("*Air Leg. Hist.*") 923 (1974). The Senate bill, from which the final version of Section 114(a) was substantially taken, used the term "authorized representative." See S. 4358, 91st Cong., 2d Sess. § 116(a)(3) (1970), *reprinted in Air Leg. Hist.* at 570.

The Conference Report shows unequivocally that no difference in meaning was intended. The Report notes that the House bill "authorized entry into and inspection of suspected polluters' facilities by *DHEW investigative personnel.*" H.R. (Conf.) Rep. 1783, 91st Cong., 2d Sess. 47 (1970), *reprinted in Air Leg. Hist.* at 151, 197 (emphasis added). It describes the Senate version in identical terms, stating that "the Senate authorized entry and inspection by *DHEW personnel.*" *Id.* (emphasis added).[32] The entry provisions of the Senate bill were adopted by the Conference Committee as part of a package adoption of the Senate's more detailed and stringent federal enforcement mechanism. See *Air Leg. Hist.* at 197-98.[33]

[32] EPA's suggestion that the term "personnel" could itself include private contractors (EPA's Brief at 41 n.28) was properly rejected by the Tenth Circuit in *Stauffer I*. Employees of private contractors are not EPA's personnel; they are the private contractor's personnel. See 647 F.2d at 1078.

[33] EPA argues that the use of the Senate version evidences Congress' intent to grant broader entry rights than the House version would have allowed. EPA's Brief at 40. That conjecture is put to rest by the legislative history which refers to "DHEW personnel" in describing both versions. As the court of appeals concluded, "[a]lthough it is ordinarily presumed that a difference in language reflects a difference in meaning, when the legislative history shows that no difference was in fact intended, that presumption is rebutted." (684 F.2d 1184, Pet. App. 20a.) The Ninth Circuit's contrary ruling in *Bunker Hill* acknowledges but then dismisses the foregoing legislative history. See 658 F.2d at 1283-84.

There was no perceived substantive difference in the language used to describe the persons entitled to enter private premises. Thus, Congress had in mind only designated federal employees when it used the words "authorized representative" in Section 114(a)(2).

Because Section 114 was drawn largely from the Senate bill, the Senate's understanding of the term "authorized representative" is particularly relevant to determining its meaning in the final version of the 1970 Amendments to the Clean Air Act. The Senate used the term in a number of provisions besides Section 114(a)(2). In each usage the Senate consistently meant only selected employees chosen from the larger class of EPA officers and employees.

The clearest example appears in Section 209(a) of S. 4358, regarding the right of access to documents concerning motor vehicle manufacturing operations. The bill provided that auto manufacturers must, "upon request of an *authorized representative of the Secretary*, permit *such officer or employee*" to have access to certain records, reports and information. *Air Leg. Hist.* at 598 (emphasis added).[34]

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[34] Under the Act as amended in 1970, authority to enter automobile plants was established in Section 206(c), 42 U.S.C. § 7525(c), and access to records of auto manufacturers was provided in Section 208(a), 42 U.S.C. § 7542(a). Both sections give the necessary authority solely to officers or employees of EPA who are "duly designated by the Administrator." The enacted language was from the House bill (which used the term "officers and employees"), rather than the Senate bill (which used the term "authorized representative"). See *Air Leg. Hist.* at 200-01. EPA argues that Congress specifically selected the language in Sections 206 and 208 to give EPA narrower authority *vis-a-vis* auto manufacturers, compared to the more general entry authority conferred in Section 114(a)(2). EPA's Brief at 41-42 n.29. However, the use of different terms merely reflects their different antecedents. The Conference Report indicates that the House and Senate provisions regarding entry of auto manufacturers' plants were "essentially the same," and that the House bill was chosen because of differences in the extent of compliance testing and disclosure. *Air Leg. Hist.* at 200-202, 507, 923.

In the same vein, Section 116(a)(2) of the Senate bill[35] provided that whenever "the Secretary or an authorized representative of the Secretary" found that a standard under the Act was being violated, he should promptly issue an order requiring abatement of the violation. *Air Leg. Hist.* at 497. It is utterly inconceivable that the Senate intended private parties to have power as "authorized representative[s]" to issue abatement orders, the violation of which would expose the violator to substantial criminal penalties. Certainly nothing in the bill or the Senate report indicates that this was the Senate's intent. See *id.* at 421-22.

Finally, the Senate bill provided in Section 304 that private individuals could bring suit to enforce the Clean Air Act. Among the requirements for using Section 304 was that the Secretary and the "authorized representative of the Secretary, if any, in the field office responsible for the area in which the alleged violation occurs" be notified. *Id.* at 523. As with the other sections, the conclusion is inescapable that the Senate, when it used the term "authorized representative," was referring to an employee of EPA, specifically appointed by the Administrator.

2. Congress reconfirmed its intent to limit entry power to public employees in enacting the Water Pollution Control Act Amendments of 1972.

Shortly after the Clean Air Act Amendments of 1970 were enacted into law, Congress explicitly reconfirmed its intention to preclude forced entry by EPA contractors under both the Clean Air Act and the Clean Water Act. In 1972, Congress substantially amended the Clean Water Act, adding among other things, Section 308, 33 U.S.C. § 1318. This section is, for all relevant purposes, identical

[35] This paragraph is particularly relevant because the language of Section 114(a)(2) of the Act at issue in this case was taken from the immediately following subsection of the Senate bill, Section 116(a)(3). See *id.* at 497.

to Section 114 of the Clean Air Act.[36] The report of the Senate Public Works Committee, in discussing Section 308, states:

> It should also be noted that the authority to enter, *as under the Clean Air Act*, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees* of the Environmental Protection Agency. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
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> *Water Leg. Hist.* at 1481 (emphasis added).

The Committee also stated that the designated EPA employees were expected to use the power to force entry "judiciously." *Id.*

Because Section 308 of the Water Act was explicitly modeled after Section 114 of the Clean Air Act, the Senate Report provides a particularly pertinent aid to interpretation of Section 114 of the Clean Air Act. As the court of appeals concluded:

> [O]rdinarily, "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant" is entitled to little weight . . . . However, this is an exceptional case. The understanding of a later Congress, while not binding, is entitled to deference . . . . The Clean Air and Clean Water Acts are in *pari materia* with one another. . . . This is especially true when the Clean Water Act's section 308(a) was explicitly modeled after section 114(a)(2) of the Clean Air Act. . . .
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> Moreover, the Senate report on the Clean Water Act Amendments was authored a scant ten months after passage of the Clean Air Act, by the same Committee (Public Works) which considered the

[36] The Report of the Senate Committee on Public Works states that, with one irrelevant exception, "Section 308 establishes authority identical to the authority for such purposes contained in the Clean Air Act Amendments of 1970 . . . ." S. Rep. No. 414, 92d Cong., 1st Sess. 62 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972 ("Water Leg. Hist.")* 1480 (1973).

> Clean Air Act. Thus, in the circumstances of this case, it is proper to give the quoted statement great weight, even though a similar statement [made] years later might be of little value.

(684 F.2d 1187, Pet. App. 27a-28a, *quoting Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).)[37]

3. In the 1977 Amendments to the Clean Air Act, Congress continued to use the term "representative" in the context of entry to refer only to public employees.

In the 1977 Amendments to the Clean Air Act, Congress added Section 114(d), 42 U.S.C. § 7414(d), as a

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[37] To show the "hazards" of relying upon post-enactment legislative history, EPA's brief quotes the Report of the Senate Public Works Committee regarding S. 1480, 96th Cong., 1st Sess. (1979). EPA's brief fails to mention that that bill was never enacted. Instead, a materially different compromise bill was passed by the Senate as a substitute, and ultimately became the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. §§ 9601-9657. See 126 *Cong. Rec.* H 11,787 (daily ed. Dec. 3, 1980); 126 *Cong. Rec.* S 14,930, 14,988, 15,009 (daily ed. Nov. 24, 1980). Compare EPA's Brief at 42 n.30. Moreover, that statute's entry provisions were not modeled after the Clean Air Act in any respect whatsoever, and the report quoted in EPA's Brief was written ten years rather than months after the Clean Air Act Amendments of 1970. Finally, after the Report was issued but before the Senate passed the different substitute bill, senators serving on the Committee on Environment and Public Works recognized that the statement in the Report quoted by EPA was erroneous and brought that circumstance to the attention of EPA. Senator Alan K. Simpson wrote to then-Administrator Douglas M. Costle, stating:

> [T]he S.1480 Report is in error regarding Congressional intent with respect to the use of private contractors for inspection purposes under the Clean Air Act and Clean Water Act and, therefore, should not be relied upon by EPA in its internal administration and most certainly should not be cited as authority to federal courts.

Letter from Senator Alan K. Simpson to Douglas M. Costle (November 19, 1980) (Attachment B to Stauffer's Reply Brief in the court of appeals).

companion provision to Section 114(a)(2). Section 114(d) requires "the Administrator (or his representatives)" to give notice to state pollution control agencies of any federal "entry, inspection, or monitoring under paragraph (2) of subsection (a)." Judge Weick noted that the purpose of the notice "is to foster cooperation and consultation between the EPA and the states" and concluded that "Congress could not have intended to entrust this kind of sensitive intergovernmental communication to employees of private contractors." (684 F.2d 1184, Pet. App. 20a-21a.)[38] To the contrary, the term "representatives" in Section 114(d) "necessarily envisions EPA employees." *Id.*

Sections 114(a)(2) and 114(d) are sister provisions. Both deal with inspections, and Section 114(d) contains an explicit cross-reference to Section 114(a)(2). Furthermore, both refer to representatives of the EPA Administrator. Such a close relationship between the sections strongly supports the conclusion, reached by Judge Weick, that they be read consistently with each other, giving the term "representative" the same meaning in each.

4. Sections 114(a)(2) and (d) share a statutory context different from that of Section 114(c).

Section 114(c) of the Act provides that the Administrator of EPA may disclose confidential information to "other officers, employees, or authorized representatives of the United States" when necessary to carry out the provisions of the Clean Air Act. Seizing upon the disjunctive "or" in that phrase, EPA theorizes that as used in Section 114(c) the term "authorized representatives" must cover private contractors, because officers and employees are separately enumerated. Reading that analysis

[38] EPA responds by claiming that "it is more reasonable to *assume*" that Congress intended to rely on EPA's "prudence" in using its employees rather than contractors to provide the intergovernmental notice required by Section 114(d). EPA's Brief at 36-37 (emphasis added). There is no legislative basis for such an assumption.

into the "representative" phrase in Section 114(a)(2), EPA argues that Section 114(a)(2) must likewise cover private contractors. EPA's Brief at 35. The argument is flawed, however, because it overlooks the differences both in context and in language between the two sections.

Unlike other usages of "authorized representative" or "representative" in the Clean Air Act, Section 114(c) refers to a representative of someone other than EPA's Administrator. Section 114(c) expressly, and broadly, denotes "authorized representatives *of the United States*." (Emphasis added.) Congress had good reason to employ this different usage in Section 114(c), given the statutory context.[39]

In enacting Section 114(c), Congress was concerned that there would be occasions on which it should not be a criminal act for the Administrator to disclose confidential information to government officials and agents outside EPA—for example, to other federal officials such as Department of Justice attorneys, staff at agencies such as the Occupational Safety and Health Administration or the Consumer Products Safety Commission, or even federal judges. In addition, state officials exercising delegated or transferred functions under the Act would be "concerned with carrying out this Act" and thus persons to whom confidential information could be disclosed. Absent a specific statutory authorization for EPA to divulge confidential information to state officials or federal officials outside EPA, the constraints imposed by the Trade Secrets Act, 18 U.S.C. § 1905, and by the Federal Reports Act, 44 U.S.C. § 3508, would apply. See *Shell Oil Co.* v. *Department of Energy*, 477 F. Supp. 413, 432-36 (D. Del. 1979), *aff'd*, 631 F.2d 231 (3d Cir. 1980), *cert. denied*, 450 U.S. 1024 (1981).

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[39] Compared to Section 114(a)(2), Section 114(c) has entirely different antecedents in the Senate bill which produced the 1970 Amendments. Section 114(c) was originally Section 114(e) of the Senate bill, whereas Section 114(a)(2) and other provisions were derived from Section 116 of that bill. See *Air. Leg. Hist.* at 197, 562-63, 570.

Against this background, Congress in drafting the Clean Air Act used the term "authorized *representatives of the United States*" to describe the other officials to whom EPA could *disclose* confidential information. It was merely adopting the terminology which it had used in earlier enactments with respect to disclosure of confidential information.[40] Instructively, language virtually identical to that of the Clean Air Act appears in Section 308 of the Clean Water Act, 33 U.S.C. § 1318, where Section 308(a)(B) provides that the Administrator's "representative" (*i.e.*, a designated employee—see *supra*, at 37) may enter and search a plant, while Section 308(b) provides that confidential information may be disclosed to other "representatives of the United States." Later statutes have continued to use this terminology respecting disclosure.[41]

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[40] See, *e.g.*, 15 U.S.C. § 1193(c) (under the Flammable Fabrics Act, confidential information may be obtained by "the Secretary or his representative" and may be disclosed to "other officers or employees" concerned with carrying out the Act); 43 U.S.C. § 236i(e) (Radiation Control for Health and Safety Act of 1968: same language); 29 U.S.C. § 664 (Occupational Safety and Health Act: same language).

[41] For example, in the Energy Supply and Environmental Coordination Act of 1974, Congress provided for the release of confidential information to any "delegate" of the Federal Energy Administrator or to other agencies when necessary to carry out their statutory duties. 15 U.S.C. § 796(d). See also Trade Act of 1974, 19 U.S.C. § 2155(g)(1)(A)(i) (disclosure to "officers and employees . . . designated by the United States Trade Representative"); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. § 5916 (disclosure to any "delegate" of the Administrator or to heads of other federal agencies). The use of the term "delegate" is instructive in that it further illustrates the traditional congressional understanding that the terms "representative" and "delegate" are synonymous and refer to designated public employees.

Only recently has Congress provided for release of confidential information to private contractors. In Section 14 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2613, and Section 15 of the Federal Pesticide Act of 1978, 7 U.S.C. § 136h, Congress explicitly authorized EPA to give contractors access to confidential information. In both instances, Congress also imposed criminal

In sum, it is crucial that Section 114(c) broadly refers to "authorized representatives of the United States," and not to authorized representatives of EPA as do the other references to representatives in the Clean Air Act. There is no reason whatsoever to assume that the Administrator's "representative" in Sections 114(a)(2) and (d) is to be functionally equivalent to the other "representatives of the United States" in Section 114(c).[42]

B. EPA's Current Arguments Regarding Section 114(a)(2) Are Not Entitled To Any Deference Whatsoever

In interpreting Section 114(a)(2), this Court is dealing with a subject which is within its own special area of competence. Deference to EPA's views is not appropriate. EPA has no congressionally conferred authority to determine those persons entitled to enter and search plants. The question presented is a legal one involving the extent of EPA's statutory authority, and no technical or scientific expertise is involved.[43] Also, the expressly contrary

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sanctions for improper release of confidential information by such private parties. See 15 U.S.C. § 2613(d)(2); 7 U.S.C. § 136h(f).

[42] In the preamble to its confidentiality rules, EPA, in discussing the relationship between Section 114(c) and the entry provisions of Section 308(a) of the Clean Water Act (which is identical to and modeled after Section 114(a)), noted that "the term 'authorized representatives' is used in a different context and in a semantically different manner" in the two sections. 41 *Fed. Reg.* 36,923 at ¶ 69 (1976).

In rejecting EPA's argument, Judge Weick observed that "[t]o apply the same meaning to 'representative' in those sections would lead to the absurd result that only the Administrator and employees of private contractors could make pollution inspections, and EPA employees [since they are not separately enumerated in Section 114(a)] could not." (684 F.2d 1185, Pet. App. 229.)

EPA's mention of the delegation authority in Section 301(a) of the Act (EPA's Brief at 36 n.22) is unavailing because such delegation may be made by the Administrator *only* "to any officer or employee of [EPA]". See also *supra*, at 35 n.34 (authority in Section 206(c) for officers and employees to enter automobile plants).

[43] See, *e.g.*, *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

legislative history shows that deference is particularly inappropriate here.[44]

Moreover, the statutory construction urged by EPA in this litigation is not a long-standing, publicly-documented agency position which would be entitled to weight.[45] The Agency's position on Section 114(a)(2) plainly has been inconsistent; the most contemporaneous construction of the statute contradicts the interpretation now proposed by EPA.[46]

The court of appeals correctly concluded that there is no foundation to EPA's suggestion that Congress has somehow ratified EPA's practice of using private contractors to force entry and inspect plant premises. EPA's Brief at 44-45 & n.32. At the time it amended the Act in 1977, Congress was not, and could not have been, aware of EPA's use of contractors to force entry by warrant. EPA had not yet adopted the practice. See *supra*, at 3. For Congress to ratify agency actions through appropriation acts, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303

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[44] See, *e.g.*, *Rowan Companies, Inc.* v. *United States*, 452 U.S. 247 (1981) (Treasury regulations invalid as improperly interpreting statute); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969).

[45] See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-145 (1976) (administrative interpretation rejected because it was not contemporaneous with passage of the relevant legislation and it conflicted with earlier interpretations by EEOC and other indicia of the proper interpretation of the statute).

[46] The earliest interpretation by EPA of Section 114(a)(2) is an internal memorandum which concludes that "the term 'authorized representative' is used synonymously with officers and employees of EPA for purposes of entering only, and *cannot be delegated to contractors* . . . ." (Jt. App. Ct. Appls. 124, 128 (emphasis added).) Two later EPA memoranda (Jt. App. Ct. Appls. 160, 164) reached an opposite conclusion by failing to consider the legislative history of the Clean Air Act and by relying erroneously on the trade-secret disclosure language of Section 114(c). These later internal agency statements lack any reasoned analysis which would entitle them to deference. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287-89 & n.5 (1978).

n.24 (1944). EPA's budget requests, cited in EPA's Brief at 45 n.32, for "field sampling of atmospheric emissions," contained in a 35-page list of Agency contracts, hardly alerted Congress to any use of private contractors for entry, search, and inspection purposes under administrative search warrants.[47] These requests could have (and presumably did) relate to research and development functions for which EPA is authorized to award contracts.[48]

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[47] *Agriculture-Environmental and Consumer Protection Appropriations for 1973: Hearings Before a House Subcomm. on Appropriations of the Comm. on Appropriations*, 92d Cong., 2d Sess., Pt. 5, at 471-506 (1972).

[48] In fact, EPA has no evident authority in the Clean Air Act to retain and pay contractors for anything other than research and development programs. A general enabling statute, 5 U.S.C. § 3109(b), authorizes federal agencies to employ contractors, if the agency has specific statutory authorization to do so. The only authorization for use of contractors under the Clean Air Act is Section 103, which allows the Administrator to "establish a national research and development program for the prevention and control of air pollution," and to "contract with public or private agencies, institutions, and organizations, and with individuals" to carry out that program. 42 U.S.C. § 7403(a), (b)(4). Thus, "research and development" are the *only* purposes for which employment of contractors is authorized under the Clean Air Act.

This limitation on the use of contractors is understandable. Since 1955, the Executive Branch has recognized that private contractors should be used to provide commercial or industrial products and services, but not to carry out any inherently governmental functions. See Office of Management and Budget ("OMB") Circular No. A-76, ¶ 4 (revision four, March 29, 1979) (reprinted as Attachment A to Stauffer's Brief in the court of appeals). In Circular No. A-76, OMB states that "[c]ertain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees." *Id.* at ¶ 4.b. Among those "governmental functions" are "regulation of the use of space, oceans, navigable rivers and other natural resources," and "regulation of industry and commerce, including food and drugs." *Id.* at ¶ 5.f.(1). OMB Circular No. A-76 was issued initially in 1966. When Congress added Section 114 to the Clean Air Act in 1970, it certainly was aware of the Circular and of earlier Bureau of the Budget Bulletins issued in 1955, 1957, and 1960 which also addressed the government's private-contractor policy.

C. Strong Common Law Considerations Support A Statutory Construction Denying Authority For Contractors To Enter And Search Private Premises

Exercise by private parties of governmental power to enter, search, and inspect private premises would be an extraordinary break with a strong and consistent common law tradition to the contrary. In the court of appeals, both Judge Weick and Judge Siler considered that an interpretation of the statute which sanctioned such an authority should be accepted only if Congress has provided an explicit mandate for such a result in clear and unambiguous language. (684 F.2d 1189, Pet. App. 33a (Judge Weick); 684 F.2d 1192-93, Pet. App. 41a (Judge Siler).)[49]

1. *Explicit authority is necessary for searches by contractors given the strong common law tradition that only government officers or employees can execute searches on private premises.*

The long-standing common law tradition is that searches should be carried out only by public officials; private citizens are precluded from obtaining warrants and entering private premises.

This common law understanding was well established by 1661, when a Proclamation issued by King Charles II specified that "warrants be always directed to some Constable, or other known Legal Officer . . . ." King Charles II, Proclamation of 17 January 1661, *reprinted in* M. Smith, *The Writs of Assistance Case* 24 (1978).[50] Writing at about the same time, Sir Matthew Hale, a prominent English jurist, noted that search warrants were infringements on the rights of the citizens which had to be tolerated in certain circumstances, and observed that "[t]hey ought to be directed to constables and other public officers, whereof the law takes notice, and not to pri-

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[49] See also *United States* v. *Bailey*, 444 U.S. 394, 415-16 n.11 (1980); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879).

[50] The Proclamation, issued shortly after the Restoration, addressed the need to search for arms held by insurrectionists.

vate persons . . . ." 2 M. Hale, *History of the Pleas of the Crown* 150 (1st American ed. 1847) (originally published in 1678). The notable exception to this English common law tradition arose in connection with Writs of Assistance, and the American colonists had great difficulty with this exception.[51]

A Writ of Assistance did not exist in common law; it was established by the British Act of Frauds of 1662. That Act authorized any person designated by the Exchequer, whether public official or private citizen, to undertake searches and to seize goods, but it also required public officials to accompany the private individuals undertaking searches.[52]

The American colonies reacted sharply to attempts to use such Writs of Assistance.[53] Based on John Adams' Abstract of a 1761 argument before the Superior Court of Massachusetts Bay,[54] it is evident that one of the

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[51] *See* Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *The Era of the American Revolution* 45 (R. Morris ed. 1939).

[52] Section 5(2) of that Act provided:

> And it shall be lawful to or for *any Person or Persons*, authorized by Writ of Assistance under the Seal of His Majesty's Court of Exchequer, *to take a Constable, Headborough or other Publick Officer* inhabiting near unto the Place, and in the Daytime to enter, and go into any House, Shop, Cellar, Warehouse or Room . . . there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed . . . .
>
> Act of Frauds of 1662, 14 Char. 2d, *reprinted in* M. Smith, *supra*, at 25 (emphasis added).

The Writ was used to enforce customs laws. In 1661, Charles II had "made over future [customs] duty receipts to private contractors in return for advances of ready cash." M. Smith, *supra*, at 27.

[53] "American histories without exception list writs of assistance as one of the active causes of the American revolution." Dickerson, *supra*, at 40. Furthermore, it is recognized that the colonial experience with the writs of assistance was the predominant reason for the enactment of the Fourth Amendment. See *id.* at 43.

[54] This Court has recognized the significance of this Massachusetts Bay case, noting that "[this] famous debate . . . was perhaps

major objections to the writ was the broad class of persons that could be authorized to conduct searches:

> [T]he writ is UNIVERSAL, being directed "to all and singular justices, sheriffs, constables and all other officers and subjects etc." so that in short it is directed to every subject in the king's dominions; every one with this writ may be a tyrant . . . .
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> John Adams' Abstract of James Otis' Argument, *reprinted in M. Smith, supra*, at 553-54.

With the demise of English rule in the American colonies, the use of this writ also died. Correlatively, nineteenth century American treatises continued to acknowledge the common law understanding that private citizens did not have the authority to conduct searches.[55]

In sum, the construction urged by EPA is in derogation of hundreds of years of common law. Had Congress desired to depart from centuries of precedent to authorize inspections by private parties, it would have done so in unmistakable terms.

2. On the sole occasion when Congress has granted authority to designate private contractors to carry out searches, it did so explicitly.

To our knowledge, no regulatory bodies other than EPA use, or have even attempted to use, private parties in carrying out administrative inspections. For example, the Mine Safety and Health Administration uses only government employees in conducting mine inspections,[56]

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the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd* v. *United States*, 116 U.S. 616, 625 (1886).

[55] See, *e.g.*, T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 305 (1868) (search warrant should be directed "to the sheriff or other proper officer, and not to private persons"); C. Tiedemann, *A Treatise on the Limitations of the Police Power in the United States* § 127 at 461-462 (1886) (search warrant "must be issued to an officer of the law, and never to the complainant").

[56] Telephone conversation with Ronald Schell, Chief, Office of Technical Compliance & Investigation.

although its underlying Act provides that entry may be made by "authorized representatives" of the Secretary. 30 U.S.C. § 813(a). The Public Health Services Act uses the term "officers or employees duly designated by the Secretary," 42 U.S.C. § 263i(a), in authorizing entry, and in a subsequent provision on prohibited acts refers to failure to permit access "by the Secretary or any of his duly authorized representatives." 42 U.S.C. § 263j (a)(3).[57]

The only instance in which Congress has extended power to private contractors to force entry is the Resources Conservation and Recovery Act. As amended by the Solid Waste Disposal Act Amendments of 1980, entry authority is extended to "officers, employees or representatives" of EPA as well as state officials. 42 U.S.C. § 6927.[58] Congress added the term "representatives" for the specific purpose of encompassing private contractors. The Conference Report on the 1980 Amendments, H.R. Rep. No. 1444, 96th Cong., 2d Sess. 35 (1980), states

[57] Other statutory grants of entry power to agencies refer specifically to governmental officers and employees. *E.g.*, Occupational Safety and Health Administration—29 U.S.C. § 657(a) ("Secretary" of Labor authorized to enter); Consumer Product Safety Commission—15 U.S.C. § 2065(a) ("officers or employees duly designated by the Commission"); Food and Drug Administration—21 U.S.C. § 372(a) ("officers and employees" or "health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department"); Treasury Department—18 U.S.C. § 923(g) ("Secretary" regarding firearms), 26 U.S.C. § 5741 ("internal revenue officer" regarding tobacco products), 26 U.S.C. §§ 7601, 7602, 7606 ("Secretary" regarding taxes and taxable items); Interstate Commerce Commission—49 U.S.C. § 11144 ("Commission, or an employee designated by the Commission"); Coast Guard—14 U.S.C. § 89(a) ("commissioned, warrant, and petty officers").

[58] Prior to the 1980 Amendments, the Act had provided power to force entry for inspection purposes only to an "officer or employee of the Environmental Protection Agency, duly designated by the Administrator" or a "duly designated officer [or] employee" of a similar state agency. 42 U.S.C.A. § 6927 (West 1977 ed.). The 1980 Amendments also added language creating a similar right of entry for purposes of conducting certain studies. See 42 U.S.C. § 6921 (b)(3)(B)(ii)(I).

that "the Conferees believe that the expanded authority to use private contractors or representatives for inspection purposes must be used judiciously, avoiding the use of contractors who have conflicts of interest." See also H.R. Rep. No. 191, 96th Cong., 1st Sess. 9-10 (1979).

In passing the 1980 Solid Waste Disposal Act Amendments, Congress did not abrogate the common law without providing special safeguards. Congress imposed criminal penalties on private contractors who improperly disclose confidential information.[59] See 42 U.S.C. § 6921 (b)(3)(B)(ii)(II). The criminal penalties are equivalent to those enforced against EPA employees under the Trade Secrets Act, 18 U.S.C. § 1905. In contrast, nowhere in the Clean Air Act are private parties subjected to any criminal penalties for disclosure of confidential or trade secret information.

Seeking to fill this void regarding the Clean Air Act, EPA points to EPA's contract with PEDCo employees as well as to EPA and general governmental confidentiality regulations. EPA's Brief at 46-47.[60] EPA claims that those provisions are "sufficient protection against

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[59] As a legal matter, outside contractors, who are not employees of EPA, are not subject to the criminal sanctions of the Trade Secrets Act, 18 U.S.C.A. § 1905, which bars unauthorized disclosure of trade secrets and other proprietary information in the hands of officers and employees of the United States. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). Nor are private contractors restricted by the Federal Reports Act, 44 U.S.C. §§ 3501-3512, which governs interagency transfers of confidential information. See *Shell Oil, supra.* Independent contractors are not government employees for purposes of civil suits under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), or for purposes of a direct constitutional claim. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[60] EPA's confidentiality regulations, 40 C.F.R. § 2.301 (1982), are not a suitable substitute for statutory safeguards because they (1) allow the release of "emission data" under a definition broader than the statutory mandate, (2) contain insufficient limitations upon the passing of information to second contractors or subcontractors, (3) raise problems of third party enforcement, (4) cannot be enforced by criminal sanctions, and (5) generally do not

disclosure."[61] *Id.* at 47. However, the action of Congress in specifically providing criminal sanctions under the Solid Waste Disposal Act Amendments disproves any such hypothesis.[62]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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offer the protection that can be obtained from a properly drafted non-disclosure agreement or from criminal sanctions.

[61] Of course the best possible protection against disclosure is not to divulge the proprietary information in the first place. After the contractor has the information, a plant owner such as Stauffer would have difficulty subsequently determining whether the information had been disclosed or used for the contractor's own gain. Opportunities for inadvertent misuse definitely are present. During the hearing in this case, the district court remarked "[t]hat [PEDCo's concurrent engineering design and construction work] concerned me more than anything else. The fact that PEDCo in addition to being a contractor that does examinations and compliance inspections appears to be a design engineer and available for working for some of your competitors." Jt. App. Ct. Appls. 310. Indeed, PEDCo has been a consultant to a number of Stauffer's competitors. See Jt. App. Ct. Appls. 133, 137, 152-155. The court of appeals thus properly concluded that PEDCo "may have an axe to grind." Compare 684 F.2d 1193, Pet. App. 43a, with EPA's Brief at 46 n.33.

[62] There is no substitute for the deterrent effect of criminal sanctions against the misuse of confidential information. The criminal sanctions under these statutes apply *in addition* to requirements contained in regulations governing the release of information to contractors.